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SUPREME COURT, U. S.

No. 70-211

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In the Supreme Court of the United States

OCTOBER TERM, 1971

J. C. PENNEY COMPANY, INC., PETITIONER

v.

THE UNITED STATES TREASURY DEPARTMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 439 F.2d 63. The opinion of the district court (Pet. App. 12a-27a) is reported at 319 F. Supp. 1023.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 1971. The petition for a writ of certiorari was filed on May 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether 28 U.S.C. 1582 gives the Customs Court exclusive jurisdiction over controversies relating to the exaction of customs duties, including special dumping duties.

STATEMENT

This action was instituted in the Southern District of New York by petitioner J. C. Penney Company, Inc., an importer of television sets from Japan, seeking declaratory and injunctive relief to prevent the Department of the Treasury from conducting an investigation under the Antidumping Act, 19 U.S.C. 160 *et seq.*, into whether the imported television sets were being sold in the United States for "less than fair value" (LTFV)—*i.e.*, "dumped".

The procedure for determining whether dumping has occurred is initiated by the Customs Bureau's issuance of a "Withholding of Appraisement Notice" when the Commissioner of Customs has reason to suspect that imported goods are being sold in the United States for less than the price at which such goods are sold in the country of exportation. The Secretary of the Treasury then must decide whether "* * * a class or kind of foreign merchandise is being, or is likely or to be, sold in the United States or elsewhere at less than its fair value * * *" 19 U.S.C. 160(a). If the Secretary so finds, the United States Tariff Commission makes a determination "* * * whether an industry in the United States

is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States." 19 U.S.C. § 160(a). If this determination is in the affirmative, the proceeding is returned to the Treasury Department for the publication in the Federal Register of a dumping finding, and the imposition by the Customs Bureau of a special dumping duty equal to the difference between the exporter's sales price and the foreign market value. Once the special dumping duty is assessed, the importer may file a protest with the Bureau of Customs. A denial of such protest may then be contested in the Customs Court. An importer may appeal an adverse decision of the Customs Court to the Court of Customs and Patent Appeals, with ultimate review in this Court by writ of certiorari.

The facts of this case are not in dispute. One day prior to the administrative LTFV determination, petitioner brought this action in the district court seeking to enjoin the making of such determination, alleging that the Treasury Department had improperly denied petitioner a hearing prior to the LTFV determination in violation of its procedural rights under the Due Process Clause of the Fifth Amendment and the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.* The district court dismissed the complaint for lack of jurisdiction over the subject matter, finding the case to be exclusively within the jurisdiction of the Customs Court (Pet. App. 12a-27a). The court of appeals affirmed (Pet. App. 1a-11a).

ARGUMENT

The dismissal of petitioner's action for lack of subject matter jurisdiction was compelled by Congress' grant of exclusive jurisdiction to the Customs Court over controversies relating to customs duties, and was in accord with settled authority recognizing the legislative intent to create in that court a "complete system of corrective justice" for all customs litigation. *Cottman Co.* v. *Dailey*, 94 F.2d 85, 88 (C.A. 4). Petitioner's concern that restricting jurisdiction to the Customs Court would deny due process rights under the Fifth Amendment is misplaced. Accordingly, further review by this Court is unwarranted.

1. 28 U.S.C. 1582(a), as amended by Section 110 of the Customs Courts Act of 1970, P.L. 91-271, expressly provides that:

> The Customs Court shall have *exclusive jurisdiction* of civil actions * * * where the administrative decision, including the legality of all orders and findings entering into the same, involves (1) the appraised value of merchandise; (2) the classification and rate and amount of duties chargeable; (3) *all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury*; (4) the exclusion of merchandise from entry or delivery under any provisions of the customs laws; * * *. [Emphasis supplied.]

To dispel all doubt as to the exclusiveness of the Customs Court's jurisdiction, Congress has defined the original jurisdiction of the district courts so as

to expressly except "matters within the jurisdiction of the Customs Court." 28 U.S.C. 1340. And the courts have long recognized that the Customs Court has exclusive jurisdiction with respect to customs controversies, and that, by the same token, the district courts are without jurisdiction. *Cottman Co.* v. *Dailey, supra; Morgantown Glassware Guild, Inc.* v. *Humphrey*, 236 F.2d 670 (C.A.D.C.), certiorari denied, 352 U.S. 896; *Horton* v. *Humphrey*, 146 F. Supp. 819 (D. D.C.), affirmed, 352 U.S. 921; *David L. Moss Co.* v. *United States*, 103 F. 2d 395 (C.C. P.A.); *Eastern States Petroleum Corp.* v. *Rogers*, 280 F.2d 611 (C.A.D.C.); *Riccomini* v. *United States*, 69 F.2d 480 (C.A. 9); *Patchogue-Plymouth Mills Corp.* v. *Durning*, 101 F.2d 41 (C.A. 2).

2. Notwithstanding the plain statutory directive, petitioner argues that the nature of the due process claims involved renders adjudication in the Customs Court inappropriate. While it may be that most litigation in the Customs Court does not involve constitutional issues, the Customs Court has authority to decide those questions. See *Riccomini* v. *United States, supra; Eastern States Petroleum Corp.* v. *Rogers, supra.* Moreover, as the court of appeals correctly noted, the recent enactment of Section 108 of the Customs Courts Act of 1970, P.L. 91-271, 28 U.S.C. 255, providing for three-judge trials in the Customs Court of actions involving constitutional attacks on Acts of Congress or executive orders, underscores the congressional intent to maintain exclusive jurisdiction in that court over *all* issues arising from

the operation of the customs laws. Finally, petitioner's contention that presumptions favoring the correctness of the administrative decision deny the possibility of trial *de novo* in the Customs Court is unfounded. Here, petitioner's challenge does not involve the merits of the LTFV determination, but rather the procedural basis on which such a determination is reached. In these circumstances, there is nothing to suggest that resolution of petitioner's claim in the Customs Court would not be satisfactory.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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